

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-1101

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * * *

In the Matter of the
Grand Jury Subpoenas of

MARIA T. CUETO

and

RAISA NEMIKIN,

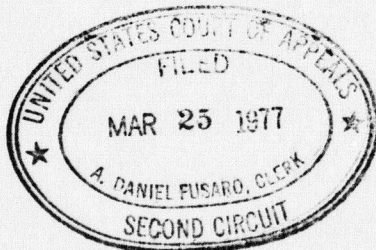
Appellants.

* * * * *

77-1101

BRIEF FOR AMICUS CURIAE

On Appeal from a Judgment of the United
States District Court for the
Southern District of New York



PEDRO J. VARELA
SONIA A. RODRIGUEZ
Counsel for Amicus Curiae
42 Homero Street - Apolo
Guaynabo, Puerto Rico 00657

TABLE OF CONTENTS

TABLE OF CASES	i
QUESTIONS PRESENTED	1
STATEMENT OF FACTS	2
ARGUMENT	
<u>POINT I</u>	
THE RIGHT TO FREEDOM OF RELIGION AND THE SEPARATION OF CHURCH AND STATE, GUARANTEED BY THE FIRST AMENDMENT MUST BE RECOGNIZED AND SECURED BY THIS COURT.....	2
(a) Prevention of Government Harassment.....	6
(b) Maintenance of Confidentiality.....	10
<u>POINT II</u>	
THE DISTRICT COURT ERRED IN DETERMINING THAT APPELLANTS ARE SOCIAL WORKERS AND NOT LAY MINISTERS OF THE CHURCH VIOLATING THEREBY, APPELLANTS' FIRST AMENDMENT RIGHTS	12
CONCLUSION	16

TABLE OF CASES

<u>Bates v. Little Rock</u> , 361 U.S. 516 (1960).....	15
<u>Boyd v. United States</u> , 116 U.S. 628 (19).....	7
<u>Branzburg v. Hayes</u> , 408 U.S. 725 (1972).....	4,8
<u>Burse v. United States</u> , 466 F.2d 1059 (9th Cir.,1972).	4,5
<u>Cantwell v. Connecticut</u> , 310 U.S. 296 (1940).....	13
<u>Dombrowski v. Pfister</u> , 380 U.S. 479 (1965).....	4
<u>Everson v. Board of Education</u> , 330 U.S. 1 (1947).....	2
<u>Gibson v. Florida Investigative Committee</u> , 372 U.S. 539.	15
<u>Gremillow v. National Association for the Advancement of Colored People</u> , 366 U.S. 293 (1961).....	15
<u>In re Nwamu</u> , No. M 11-188, unreported,(S.D.N.Y. Nov. 4, 1976).....	8
<u>In re Verblanck</u> , 329 F. Supp. 433 (C.D. Cal.,1971).	4,10,11
<u>Kedroff v. St. Nicholas Cathedral</u> , 344 U.S. 94 (1952)...	14
<u>Kreshik v. St. Nicholas Cathedral</u> , 363 U.S. 190 (1960)	14
<u>Maryland and Virginia Churches v. Sharpsberg Church</u> , 396 U.S. 367., (1970)	14
<u>NAACP v. Alabama ex rel Patterson</u> , 357 U.S. 449 (1958)	15
<u>NAACP v. Button</u> , 371 U.S. 415 (1963)	15
<u>People v. Woody</u> , 61 Cal . 2d 716, 394 P. 2d 813 (1964)	9
<u>Presbyterian Church v. Hull</u> , 393 U.S. 440 (1969)	13,14
<u>Reynolds v. United States</u> , 98 U.S. 145 (1897)	2,6,13
<u>Roemer v. Board of Public Work of Maryland</u> , 96 S. Ct. 2337 (1976)..	3
<u>Schneider v. State</u> , 308 U.S. 147 (1939)	15
<u>Serbian Eastern Orthodox Diocese v. Millbojovich</u> , 96 S. Ct. 2373 .. (1976)	2,14
<u>Shelton v. Tucker</u> , 364 U.S. 479 (1960)	15
<u>Sherbert v. Verner</u> , 374 U.S. 390 (1963)	13

<u>Watson v. Jones</u> , 13 Wall. 679 (1871)	2, 14
<u>Wisconsin v. Yoder</u> , 406 U.S. 206 (1972)	13

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * * *

In the Matter of the
Grand Jury Subpoenas of

MARIA T. CUETO

and

RAISA NEMIKIN,

Appellants.

* * * * *

*

*

*

77-1101

*

*

*

BRIEF OF THE AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the right to freedom of religion and the separation of Church and State, guaranteed by the First Amendment should be recognized and secured by this Court.

2. Whether appellants are lay ministers of the Episcopal Church and as such protected by the wall of separation between Church and State.

STATEMENT OF FACTS

Amic rely on the facts set forth in the brief filed by appellants in this case.

ARGUMENT

THE RIGHT TO FREEDOM OF RELIGION AND THE SEPARATION OF CHURCH AND STATE, GUARANTEED BY THE FIRST AMENDMENT MUST BE RECOGNIZED AND SECURED BY THIS COURT.

A "Wall of separation" Reynolds v. United States, 98 U.S. 145, 164 (1897), erected between church and state has, since the founding of the Republic, been deemed essential to political democracy in America. On one side of that wall lies the right of individuals and churches to pursue their religious beliefs and activities secure in the knowledge that an individual may not "be enforced, restrained, molested, or burthened in his body or goods, nor otherwise suffer" on account of those beliefs. Everson v. Board of Education, 330 U.S. 1, 13 (1947) (citing Jefferson's Virginia Bill for Religious Liberty).

On the other side of that wall lies a civil government absolutely free of religious entanglements. The United States Supreme Court has declared:

The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority. Watson v. Jones, 13 Wall. 679, 730 (1871).

See also, Serbian Eastern Orthodox Diocese, etc. v. Milibojevich, 96 S.Ct. 2372 (1976); Roemer v. Board of Public Works of Maryland, 96 S.Ct. 2337, 2345 (1976). Subpoenas issued by the civil authority to church personnel inquiring about an official church organization and its members represent serious intrusions on the religious liberty protected by the First Amendment.

The National Commission on Hispanic Affairs for the Episcopal Church (NCHA), which was the focus of the demands of the subpoenas served on appellants, has stated its goals as including furthering "ongoing work of the church among 'Hispanos' assisting, supporting and stimulating the Church to continue to reaffirm its mission". As such, it is typical of the many commissions, projects, and offices sponsored by almost every major denomination, attempting to translate religious faith into contemporary realities. Governmental intrusions into such efforts pose serious problems, not merely for NCHA and the Episcopal Church, but for all religious bodies and organizations concerned with translating their faith into social action and active ministries among the poor and oppressed of our nation.

Compulsion of testimony or evidence from church personnel concerning the activities of their organizations would create a large hole in the "wall of separation" between church and state. It suggests that the state has a right to oversee the exercise of religious beliefs and penalize those deemed inimical to its interests. In addition, the secret nature of the grand jury

proceedings sows seeds of distrust and undermines the confidence and trust which is essential to an effective ministry.

Without this trust and freedom from state interference, religious communities and their efforts cannot survive. In the instant case, the work of NCHA has been seriously disrupted and its relation with other church bodies jeopardized. The stigma of an FBI investigation, subpoenas and grand jury investigations will undoubtedly hinder its progress in furthering its work in the Hispanic community, as well as its mission to stimulate the Church to reach out to that community. Other church projects with similar goals and constituencies will find their efforts threatened. The danger that church organizations will find their energies and attention diverted from their ministries to defending against invasions, such as the subpoenas validated by the District Court, is real and serious. In other words, the decision of the District Court presents among other things, a classic example of the chilling effect of governmental interference on activities protected by the First Amendment.

The subpoena power of a grand jury is, like every other power of the government, limited by the First Amendment. See, Branzburg v. Hayes, 408 U.S. 725 (1972); Bursey v. United States, 466 F.2d 1059 (9th Cir., 1972); and In re Verplank, 329 F. Supp. 433 (C.D. Calif., 1971). Stressing that "the chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure," Dombrowski v. Pfister, 380 U.S. 479, 487 (1965),

the United States Supreme Court enjoined the prosecution of a pending indictment ^{of} members of a group dedicated to social and economic justice (Southern Conference Educational Fund, Inc.). In this case it is the fact of the subpoena, unaffected by whether witnesses testify or anyone is ever indicted, which creates the "chill" on the exercise of protected rights. The mere fact that subpoenas were served and were litigated has resulted in serious stigmas having been attached to NCHA, and appellants themselves.

Abuse of the grand jury process to interfere with and chill the exercise of First Amendment rights by religious and political groups has recently attracted widespread attention and pointed criticism. See, e.g., 8 Moore's Federal Practice, 56.02 /T/b; Bursey v. United States, 466 F.2d 1059, 1089 (9th Cir., 1972) and United States v. Briggs, 514 F.2d 794, 805-806 (5th Cir., 1975). Now, for the first time in the nation's history, subcommittees of both houses of Congress are considering grand jury reform proposals to eliminate the kind of abuses illustrated by this case.

As noted by Judge Hufstedler in Bursey v. United States, 466 F.2d 1059 (9th Cir., 1972), "it would be a cruel twist of history" to allow the grand jury to be used to invade the province of religious liberty and undermine the wall which safeguards both religious and political freedom in America.

Amicus does not contend here that religious groups are totally immune from Grand Jury process. Amicus does contend,

however, that where the investigative needs of the Gran Jury clash with the constitutionally-protected rights of religious groups, the courts must be extraordinarily sensitive to the protection of those rights, and must ensure that the adverse effects of the investigation are minimized. This requires at least that the Government show some compelling need for the material subpoenaed before the religious body is forced to turn it over.

The reason for this requirement is two-fold: First, it is necessary to limit generally the opportunity for governmental interference with religion, lest such interference be used unconstitutionally to harass religious groups which have fallen into the government's disfavor; Second, it is necessary to limit even valid governmental inquiries to a minimum, in order to preserve the confidentiality so necessary to free and untrammelled exercise of religion.

A. Prevention of Government Harassment

Thomas Jefferson stated that the First Amendment built a "wall of separation between Church and State." See Reynolds v. United States, 98 U.S. 145, 164 (1897). In order to maintain that wall strong and intact, it is necessary to require the government, whenever it wishes to intrude into the affairs of a church, to show beforehand a particularized and compelling need for the information sought.

This must be an absolute rule. It cannot be given lip service in the abstract, and then ignored in the presence of

an actual government demand for information. Otherwise, the rule will cease to be of any effect and the "chilling effect" of the government's potential interference will inevitably crumble away the wall between Church and State erected by the First Amendment.

It is particularly necessary to remember this in this case, where the investigation of the Grand Jury is directed at a concededly serious matter, and where the need for information may appear strong. In such a case, it is easy to overlook the possibility of harassment, and simply order the disclosure without thinking of the broader consequences. Such a course, however, could be disastrous to the protection of First Amendment freedoms. Hard cases, as the maxim goes, make bad law.

Judge MacMahon of the Southern District realized this in an opinion handed down very recently in a case involving the quashing of a grand jury subpoena. Finding the subpoena to be improper, Judge MacMahon quashed it and ordered the return of materials produced pursuant to it. Toward the end of his opinion, Judge MacMahon stated:

"Rights guaranteed by the Bill of Rights must be zealously guarded if they are not to be whittled away, little by little, through minor seemingly innocuous intrusions which may, over the course of time, result in significant erosion of those rights. The comment of the Court, in Boyd v. United States, supra, 116 U.S. at 635, is particularly opposite to this situation:

'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get

their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereof." /footnote omitted/ (In re Nwamu, Index No. MII-188, unreported opinion, Nov. 4, 1976, pp. 15-16.)

Judge MacMahon's observation is opposite here. In order to ensure that the day does not come when the government may trample down our cherished first amendment right to free exercise of religion, it is crucial that the courts zealously guard against any encroachment on that right, even if seemingly justified by the exigencies of the situation.

It is not an answer to this argument that other constitutionally protected groups, notably the Press, have more limited immunity from Gran Jury process. In the first place, the extent of the Press' protection is not totally clear. While a plurality of the Supreme Court did indicate a relatively narrow view of the Press' immunity from process in Branzburg v. Hayes, 408 U.S. 665 (1972), the plurality nevertheless noted the requirement "that a State's interest must be compelling or paramount to justify even an indirect burden on First Amendment rights," and stated that the requirement was met in that case. (408 U.S. at 700) Furthermore, the Court cited with approval the "Guidelines for Subpoena to the News Media" promulgated by the

Attorney General in 1970; these guidelines require, among other things, that "all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press." (408 U.S. at 707, n. 41.)

Secondly, there are different considerations for religious groups than there are for the Press. There is not the same "wall" between the State and the Press as between the State and the Church. Thus, for instance, it has never been thought that ordinary police power regulations may not be applied to the Press; they may, however, be constitutionally inapplicable to religious groups. See, e.g., People v. Woody, 61 Cal. 2d 716, 394 P.2d 813 (1964) (use of peyote in religious ceremony may not, constitutionally, be proscribed). Additionally, the Church throughout the ages has been a sanctuary for those out of favor with the government. While this concept of sanctuary has not, in this country, extended to the point of making fugitives on church property totally immune from arrest, it nevertheless militates in favor of a sensitivity to the Church's historical role as a refuge from the power of the State. See, e.g., Guild of St. Ives, "The Concept of Sanctuary Under Federal and New York Law," (unpublished, 1968). Such a role would be hopelessly compromised if Church files were available for inspection on demand by agents of the State.

In order to maintain the separation between Church and State inviolate, it is necessary for the law to stand at the door of the Church and refuse entry to agents of the State.

The dangers of not doing this have become apparent over the last few years. In the late 1960s and early 1970s, churches, particularly those involved in unpopular causes, were the subject of several tax audits. See gen. Kelley, A Report to the General Board on "New Developments in the Relations Between Church and State," (National Council of the Churches of Christ in the U.S.A., unpublished, 1972), and Guild of St. Ives, "Church Tax Exemption and Political Activities," (unpublished, 1971); these materials and this problem are discussed in Note, "Constitutional Aspects of Church Taxation," 9 Colum. J. of Law and Soc. Prob. 646, at pp. 671 et seq. There was substantial evidence at that time that these audits were used to harass churches whose activities were in disfavor with the government. There is a similar danger that the Grand Jury, unless subject to close limitations, could be used to thwart the Church in its traditional role as prophet. Prophets are often not popular; but the First Amendment forbids the government to interfere with or chill the exercise of their right to prophesy.

B. Maintenance of Confidentiality

In In re Verplank, 329 F.Supp. 433 (C.D. Cal. 1971), and ordained Presbyterian Minister was served with a Grand Jury subpoena requiring him to produce before the Grand Jury records of a draft counseling service of which he was the director. Mr. Verplank moved in the District Court to quash the subpoena on the ground that it violated the clergyman-communicant privilege, and also violated the First Amendment. The District

Court granted the motion and quashed the subpoena. It first held that a clergyman-communicant privilege was applicable to Grand Jury proceedings, and then found that compliance with the subpoena by Mr. Verplank would violate this privilege. It also held that the counseling staff of the draft counseling center, although not themselves ordained ministers, came within Mr. Verplank's privilege since they aided him in the exercise of his ministry. The Court then concluded that for "Rev. Verplank to respond fully to the subpoena would necessarily entail revelation of protected confidence..." and quashed the subpoena. (329 F.Supp. at 436.)

The Verplank case is compelling authority that the decision in this case should be reversed. The Hispanic Commission, like a draft counseling service, provides advice and direction to those who come for it for aid. Indeed, even more than a draft counseling service, the Hispanic Commission performs traditional religious functions for its constituency. Therefore, clearly, the subpoenaing by the Government of the files of the Hispanic Commission, the subpoenaing of employees of the Commission and finding appellants in contempt of court, have violated the confidentiality of the Commission and of those, like appellants, who work through the Commission as lay ministers to their Hispanic communicants.

The District Court erred in determining that appellants are social workers and not lay ministers of the Church violating thereby appellant's First Amendment rights.

Ms. Cueto and Ms. Nemikin both serve as lay ministers with the Protestant Episcopal Church, as the National Director of the NCHA and her bilingual secretary, respectively. The NCHA is an official agency of the Church, working under the auspices of the Domestic and Foreign Missionary Society. The NCHA was created to bring the Christian mission of the Church to the Hispanic people by serving their spiritual, as well as their social and economic needs. In ruling on appellant's Motion to Quash the subpoenas, Judge Pierce ruled that appellants were, in fact, merely "social workers" operating in "affiliation" with the Protestant Episcopal Church. The appellants were denied a full adversary hearing to present their First Amendment claims. Affidavits supplied to the Court on behalf of appellants placed a burden on the government to show both a "compelling interest" in and a nexus between the witnesses and the subject matter of the investigation.

In support of the motion on behalf of the Episcopal Diocese of New York to intervene on behalf of the appellants on the Motion to Quash, the Right Reverend Paul Moore, Jr., stated in his affidavit:

...As spiritual head of the Diocese, it is my episcopal duty to minister to the needs of this /Hispanic/ population. In furtherance of this ministry, I work closely with the National

Commission for Hispanic Affairs ("The Hispanic Commission") ... and I view the Hispanic Commission an integral part of my ministry. In furtherance of this ministry, I often write or otherwise communicate with the Hispanic Commission. I view these communications as confidential.

...In dealing with the Hispanic Commission, I of necessity must and do work with these two women /appellants herein/, and I view them as integral aides in my ministry. In order for this relationship to remain useful to my ministry, it is absolutely necessary that the relationship remain confidential.

During the course of the contempt proceedings for appellants, Judge Frankel accepted as true, and was uncontroverted by the government, affidavits from Reverend John Stevens, an ordained minister of the Episcopal Church, and Carman Hunter, a lay minister of twenty-eight (28) years and the appellants' former supervisor. They supported the appellants' claim of religious freedom as lay ministers.

The courts have firmly protected these First Amendment rights from government interference.

The Religion Clauses has specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (Emphasis supplied)

See also, Sherbert v. Verner, 374 U.S. 390 (1963); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); Reynolds v. United States, 98 U.S. 145 (1897); Cantwell v. Connecticut, 310 U.S. 296 (1940).

Judge Pierce's finding of appellants as "social workers" and the NCHA as a "social work agency" is not only erroneous, but in itself violates the separation doctrine. The very essence of the First Amendment is to prohibit the government from playing a role or inhibiting questions of religious doctrine, mission, ministry, etc. In Presbyterian Church v. Hull Church, supra. at 448, the Supreme Court spoke as to the meaning of religious freedom, independent of governmental interference.

...a spirit of freedom for religious organizations, an independence from secular control or manipulation --in short, power to decide for themselves, free from state interference, matters of Church government as well as those of faith and doctrine.

See also, Serbian Eastern Orthodox Diocese, etc., v. Millvojevich, 96 S.Ct. 2372 (1976); Maryland and Virginia Churches v. Sharpsberg Church, 396 U.S. 367 (1970); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Watson v. Jones, 13 Wall 679, 20 L.Ed. 666 (1872).

Clearly, Judge Pierce's finding as to appellants' First Amendment guarantees of religious freedom were erroneous. The government, in only presenting a non-adversary submission of documents, did not meet their burden to show a compelling interest, sufficient to overcome appellants' constitutional rights.

Along with guarantees of religious freedom, appellants have asserted that their First Amendment associational rights were violated, and thus there was "just cause," pursuant to

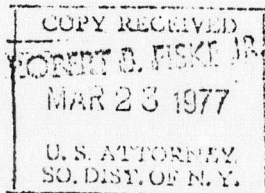
statute, for their refusal to answer questions put to them before the grand jury.

It is clear that both Ms. Cueto and Ms. Nemikin were subpoenaed in their capacity as officers and members of the NCHA. This point is well exemplified in that their relationship to this investigation stems from Mr. Torres' membership in the NCHA. The courts have consistently held that when First Amendment associational rights are asserted the government must come forward to show a sufficient "nexus" between the organization being subpoenaed (here, the NCHA) and the subject of the investigation (in the instant case, the FALN). N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Bates v. Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Gremillon v. N.A.A.C.P., 366 U.S. 293 (1961); Schneider v. State, 308 U.S. 147 (1939).

The government has not showed a sufficient nexus between the NCHA and the FALN to override appellants' associational rights as required under Gibson v. Florida Investigative Committee, 372 U.S. 539. Judge Pierce and Judge Frankel, in his reliance on the previous decision, erred in accepting ex parte, in camera documents to sustain the government's burden. See Appellants' Brief, Point I.

CONCLUSION

FOR THE ABOVE-STATED REASONS
APPELLANTS REQUEST SHOULD BE
GRANTED AND THE JUDGMENT HOLD-
ING APPELLANTS IN CIVIL CON-
TEMPT PURSUANT TO 18 U.S.C.
1826 (a) SHOULD BE REVERSED.



Respectfully submitted,

PEDRO J. VABELA
SONIA A. RODRIGUEZ
Counsel for Amicus Curiae
42 Homero Street - Apolo
Guaynabo, Puerto Rico 00657